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January 23, 1997

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Federal Communications Commission
Office of Secretary

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: CS Docket No. 96-60
<u>Ex Parte Presentation</u>

Dear Mr. Caton:

Pursuant to Section 1.1206 of the Commission's rules, this is to notify the Commission that on January 22, 1997, representatives of ValueVision International, Inc. ("ValueVision"), the 90s Channel, the Center for Media Education, and the Consumer Federation of America met with Anita Wallgren to discuss matters raised in the comments filed in the above-referenced proceeding. Representatives of ValueVision also provided a copy of the attached memorandum.

If there are any questions concerning the above-referenced matter, please communicate with the undersigned.

Sincerely yours,

William R. Richardson, Jr.

cc: Anita Wallgren

January 22, 1997

1. In 1992, Congress directed the Commission to make leased access a "genuine outlet."

   a. As Commissioner Ness recognized at the March 1996 FCC meeting, despite cable industry efforts the 1996 Act left this requirement untouched.

   b. Rep. Markey to Chairman Hundt, Dec. 18, 1996: The leased access regulations should lead to creation of "viable outlets" for unaffiliated programmers.

2. If must carry is invalidated, leased access may be the only way for a number of broadcasters to gain cable access -- and to ensure viewer access for their public interest programming (e.g., children's, political, news and public affairs, sports).

3. NCTA's average fee proposal will not make leased access the genuine outlet Congress intended. It will kill off leased access as a potential source of diversity and competition to vertically integrated cable operators, who the Commission has recently again concluded still retain potential market power. If the Commission adopts such a proposal, it will have "botched [it] totally." Henry Geller, Broadcasting/Cable, Jan. 6, 1997.

   a. As the Commission already has found, it permits double recovery -- once from subscribers, and again from programmers.

   b. In the context of tier programming, it wrongly assumes that the value of a displaced channel is the average value of a channel, when the displaced channel will in fact be the <u>least</u> valuable channel.

4. Cable operator claims that a mere 10-15% leased access set aside will lose them subscribers are not supported by any reliable data.

   a. It is the cable industry that would have data about the effects of dropping cable channels, and it has never produced any.

   b. The argument is inconsistent with MSO behavior. TCI has been "the most aggressive in channel switchouts this year" -- even before taking a 20% option in Fox's news channel and proceeding to bump a wide variety of established programmers who did not agree to pay up front. The opportunity cost/market formula would lead to a similar auction -- only it would ensure that competitors like ValueVision are eligible to bid in that auction.

   c. The argument makes no sense. Even if must carry is sustained, cable programmer commenters have recognized what the operators refuse to admit: that any channels required to be dropped will be those without "strong subscriber viewership," and not "HBO, CNN, or USA." Prevue; Liberty Sports.

   d. This is the same scare story that preceded must carry. As the Bureau recently concluded in denying a stay of must carry in the New York market, "cable operators add and delete cable programming services from time to time, and at their own discretion, without imposing an undue burden on subscribers' viewing habits." Cablevision Systems Corp., DA 96-1231 (August 2, 1996).

e. Continental's Senior VP of Programming and Advertising concedes in the comments that it is "impossible to separate the impact on a cable system of particular programming decisions from other important factors, such as price, advertising and promotional efforts, and changing consumer tastes." Affidavit at 13.

f. The ongoing upgrades of cable operators, pursuant to social contract requirements and otherwise, make these unsupported claims even more speculative.

5. Cable programmers should not be protected from competition any longer.

a. Jedd Palmer, Senior VP Programming, TCI: "I don't subscribe to the notion that once you're on a cable system, you're on forever." Electronic Media, August 26, 1996. In fact, many cable program affiliation agreements have 30-day cancellation provisions.

b. TCI: ". . . we don't think that any of these rounds of deletions [for Fox] will have a material long-term impact on any programers involved." Broadcasting and Cable, Sept. 2, 1996, at 52.

c. Cable programmers have no justifiable reliance on the absence of leased access after the 1992 Cable Act reforms, particularly given the pendency of proceedings to improve upon those reforms since 1993. The balance of equities here lies with competition -- and with those who have been deprived of opportunities to compete for carriage for over three years. Their claims that the implicit fee formula is fundamentally wrong have now been accepted, and the "going forward" regime adopted after the 1992 Cable Act provides no basis for delaying any further the clear mandate of Congress.

6. ValueVision's proposal is to create a floor of 10 cents per sub per month, with higher rates if justified under the opportunity cost/market formula. This is no subsidy rate. It is the rate paid by QVC and HSN in the market. It is what Adelphia proposed to charge for a la carte shopping channels. And it is the explicit fee Time-Warner itself endorsed in 1993 in its pleadings on reconsideration of the implicit fee.